



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1044 OF 2024

ALFRED NTHALE NDUTA A.K.A ITSYABA..... COMPLAINANT

-VERSUS-

SAVANNAH BRANDS COMPANY LTD

T/A AFRICAN ORIGINALS & KENYAN ORIGINALSRESPONDENT

DETERMINATION

(Pursuant to Section 8 (f) and 56 of the Data Protection Act, 2019 and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. This Complaint is in respect of the Complainant's claim that the Respondent used his image commercially to market and advertise its products on social media platforms without his consent.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, to further guarantee the same, the Data Protection Act, 2019 (hereinafter 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' or 'the Office') was established pursuant to Section 5 of the Act and is mandated with the responsibility of regulating the processing of personal data; ensuring that the processing of personal data of a data subject is guided by the principles set out in Section 25 of the Act; protecting the privacy of individuals; establishing the legal and institutional mechanism to protect personal data and providing data subjects

with rights and remedies to protect their personal data from processing that is not in accordance with the Act.

4. Section 8 (f) of the Act provides that the Office can receive and investigate any complaint by any person on infringements of the rights under the Act. Furthermore, Section 56 (1) of the Act provides that a data subject who is aggrieved by a decision of any person under the Act may lodge a complaint with the Data Commissioner in accordance with the Act.

C. BACKGROUND OF THE COMPLAINT

5. The Office received a complaint dated 18th July 2024 by Alfred Nthale Nduta (hereinafter 'the Complainant'), on 22nd July 2024, pursuant to Section 56 of the Act and Regulation 4 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainant who is the aggrieved data subject.
6. Pursuant to Regulation 11 of the Enforcement Regulations, on 24th July 2024, this Office notified the Respondent of the complaint filed against it *vide* a letter of a similar date and required their response within 21 days.
7. On 6th August 2024, The Respondent responded to the said notification *via* email. On the said e-mail the respondent requested that the complaint be resolved through mediation according to Section 9 (1) (c) of the Act, Regulation 15 of the Enforcement Regulations, and the Alternative Dispute Resolution (ADR) Guidelines published by this Office.
8. As the ADR process is party-driven, the Complainant was requested to consent to resolving the dispute through mediation or conciliation. The Complainant agreed to attempt to resolve the dispute through ADR.
9. Despite attempts to resolve the dispute through ADR, the complaint was not resolved and therefore, the dispute was referred back to this Office for determination as per Regulation 15 (8) of the Enforcement Regulations which provides that where the complaint is not determined through ADR, the Data Commissioner shall proceed to determine the complaint as provided for in the Act and the Regulations.

NA

10. The Respondent provided a substantive response to the complaint in a letter dated 19th August 2024 sent *via* e-mail on 23rd August 2024.

11. This determination is therefore a result of analysis of the complaint as received, the responses from the Respondent, and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

I. COMPLAINANT'S CASE

12. It is the Complainant's case that on various dates in the years 2020 and 2022, the Respondent obtained his photographs from his and his photographer's Instagram pages without consent or authorization and utilized them for advertisement of their products on their various social media platforms.

13. The Complainant contended that in addition to posting his photos, the Respondent further edited one of the photos to advertise that they had been selected as finalists for the World Beverage Innovation Awards 2020 for best alcoholic drink.

14. As part of his evidence, the Complainant adduced

- i) The Complainant's Demand letter addressed to the Respondent
- ii) Images of the likeness of the Complainant under certificate of electronic evidence
- iii) The complainant's national identification card.
- iv) Impugned social media pages that the Respondent used the Complainant's images.

II. RESPONDENT'S CASE

15. As stated above the Respondent provided a substantive response to the complaint on 23rd August 2024.

16. In its response, the Respondent stated that:

- (i) The Complainant posted a photo of himself on his socials holding a KO drink and went ahead to tag them without their consent. The Claimant is neither an agent nor an employee of KO thus this act of posting the mentioned image was a way to attract attention from the society for his own gain.

(ii) The Respondent submitted that it does not know the Complainant and it has never engaged his services for any promotional activities and as such they have no record of any agreement or contract with the Complainant.

(iii) The Respondent further contended that considering they had no agreement with the Complainant, the Complainant used its brand without their authority thereby infringing on their trademark and brand integrity.

(iv) The Respondent stated that the Complainant masqueraded as its brand ambassador for his personal gain. To them, he was the initial infringer of their trademark and brand by passing off as being associated with them.

E. ISSUES FOR DETERMINATION

17. It is an undisputed fact in this case that the Respondent posted the Complainant's photograph on its social media account, specifically, Instagram.

18. Before outlining the issues for consideration, this Office notes that the Respondent in its response raised a counterclaim on the head of trademarks and trademark infringement by the Complainant. On this issue, this Office lacks mandate concerning trademark and its related aspects. We hereby advise the Respondent to channel its trademark-related claims appropriately.

19. That being said, having considered the nature of the complaint, the evidence adduced by all parties to the complaint, and the investigations conducted by this Office in line with the mandate as stated in paragraphs 3 & 4 herein, the issues for determination that arise are:-

i. Whether the Complainant's personal data was lawfully processed; and

ii. Whether the Complainant is entitled to any remedy under the Act.

F. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINANT'S PERSONAL DATA WAS LAWFULLY PROCESSED.

20. The Complainant challenges the collection of his image by the Respondent without his authorization and consent and the Respondent's use of the images for advertisement purposes.
21. The Complainant and his photographer posted the Complainant's photograph on social media. The photograph is personal data as it identifies the Complainant and was publicly available.
22. The Respondents do not dispute that they collected the Complainant's personal data from his social media. According to them, the Complainant posted a photo of himself on his social media holding a KO drink and tagged their social media handle on the said photograph without consent.
23. By obtaining and having access to the Complainant's photograph and deciding to post the same on its own Instagram account, the Respondent became a data controller for any subsequent processing of the Complainant's personal data that deviated from the purpose which the Complainant posted his photograph online.
24. As a data controller, the Respondent was obligated to ensure that there was a lawful basis for processing the Complainant's image and posting the same on their Instagram account.
25. The Complainant alleges that by the Respondent taking his photograph and using it, including to showcase its product as a "Finalist in the World Beverage Innovation Awards 2020" on its social media platform as manifest from the evidence adduced to this Office, this amounted to advertisement in form of online/internet marketing and commercial use of personal data.
26. This Office has perused the Respondent's online posts adduced as evidence in this Complaint and it is clear that the Complainant's impugned photograph is still online.
27. From the evidence adduced to this Office and from the investigations conducted, we note that indeed the Respondent had used the Complainant's photo, including

to showcase its product was a Finalist in the World Beverage Innovation Awards 2020.

28. Section 37 of the Data Protection Act provides for commercial use of data and states that a person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person has sought and obtained express consent from a data subject or is authorized to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject.

29. Regulation 14 of the Data Protection (General) Regulations 2021 further provide for commercial use of personal data as follows:-

14. Interpretation of commercial purposes

(1) for the purposes of section 37 (1) of the Act, a data controller or processor shall be considered to use personal data for commercial purposes where personal data of a data subject is used to advance commercial or economic interests, including inducing another person to buy, rent, lease, join, subscribe to, provide or exchange products, property, information or services, or enabling or effecting, directly or indirectly, a commercial transaction. [Emphasis ours]

30. From a collective reading of the above legal provisions, it is discernible that any form of showcasing, influencing, and/or advancing a commercial transaction whether directly or indirectly using personal data amounts to the commercial use of personal data.

31. The commercial use of personal data obtained by the data controller must be with the consent of the data subject.

32. By the Respondent showcasing that it was a finalist in the World Beverage Innovation Awards 2020 it was advancing its commercial interests by inducing the members of the public to buy their product. The Respondent was informing the members of the public of the quality of the brand/ product to the extent that it was in the final of the World Beverage Innovation Awards 2020 with the intention to advance its commercial and economic interests.

33. The Respondent processed the Complainant influenced commercial transactions both indirectly and directly.
34. As such, the actions of the Respondent amounted to internet marketing and commercialization of the Complainant's personal data, without the Complainant's consent.
35. The Office therefore finds that the use of the Complainant's personal data for commercial purposes was unlawful and contravened the Act.

II. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDY UNDER THE ACT.

36. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the complainant is entitled. Further, the remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.
37. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent did not process the Complainant's personal data in accordance with the law, it, therefore, follows that there has been a violation of the Act by the Respondent.
38. Section 65 (1) of the Act provides for compensation to a data subject and states that a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.
39. Regulation 14 (3) (e) of the Enforcement Regulations further provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
40. The Complainant claimed for the remedy of compensation against the Respondent. The Respondent on its part stated that the Complainant's claim is null and void. To the Respondent, the Complainant is an opportunist and his act was of bad faith yet he was the greatest beneficiary of the post and attention.

41. Having found that Respondent unlawfully used the Complainant's personal data for commercial purposes, the Respondent is hereby directed to compensate the Complainant an amount of Kshs. **500,000/= (Five Hundred Thousand Shillings Only)**.

G. FINAL DETERMINATION

42. In the ultimate, the Data Commissioner therefore makes the following final determination:

- i. The Respondent is hereby found liable for unlawfully processing the Complainant's personal data.
- ii. The Respondent is ordered to Compensate the Complainant **500,000/= (Five Hundred Thousand Shillings Only)** for the unlawful processing of the Complainant's personal data.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 9th day of October 2024



Immaculate Kassait, MBS

DATA COMMISSIONER